

**WHEN RECORDED, RETURN TO:**

City of Tempe Basket

**DEVELOPMENT AGREEMENT**

No. C 2010-\_\_\_\_\_

THIS DEVELOPMENT AGREEMENT (this "Agreement") is made and entered into as of the \_\_\_\_ day of \_\_\_\_\_, 2010, between the City of Tempe, an Arizona municipal corporation (the "City"), and American Outdoor, a Nevada corporation ("American Outdoor").

**R E C I T A L S**

WHEREAS, American Outdoor desires to construct and install two freestanding off-premise freeway signs within the City of Tempe on real property adjacent to the Loop 101 Freeway, one on APN#132-36-003S and the other on real property adjacent to the I-10 Freeway on APN#123-28-159, which properties are more particularly identified on Exhibits A and B hereto; and

WHEREAS, City and American Outdoor desire to set forth herein their understandings and agreements with respect to the sign; and

WHEREAS, this Agreement is a development agreement pursuant to the provisions of A.R.S. §900.05.

NOW, THEREFORE, in consideration of the foregoing premises and the mutual promises and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto state, confirm and agree as follows:

**A G R E E M E N T**

**1. Definitions.** The following terms shall have the meanings set forth below whenever used in this Agreement, except where the context American Outdoor indicates otherwise.

**1.1** "City" shall mean the City of Tempe, an Arizona-municipal corporation, and any successor public body or entity.

**1.2** "American Outdoor" shall mean American Outdoor, a Nevada corporation.

**1.3** “Parties” and “Party” shall mean all of the parties to this Agreement collectively or each of the parties individually, as the context may require.

## **2. Development Issues.**

**2.1 Conditions.** Subject to Section 2.3, City hereby authorizes American Outdoor to construct, install, maintain, renovate, repair, rebuild and lease (to third parties for profit), a freestanding off-premise freeway sign on the Property in compliance with the following limitations:

2.1.1 American Outdoor shall submit for the requisite signs and building permits on or before February 1, 2011, and shall promptly install the signs after receipt of the requisite sign permits;

2.1.2 The signs shall consist of a single monopole structure with not more than two (2) faces, each having a display face size of 13’6.5”x 47’8” (hereafter described as 14’x 48’) and a height not more than 55 feet above road grade;

2.1.3 The sign shall have a decorative pole cover and landscaping at the base, and shall be subject to review as set forth in Section 2.4; and

2.1.4 American Outdoor shall pay City an amount equal to \$36,000.00 per year payable monthly in advance for each sign commencing on the first day of the first month after the electrical service for each sign is energized by the Salt River Project Power Company, and continuing on the first day of each month thereafter during the term of this Agreement. If the duration of the sign is extended pursuant to Section 2.5, the annual payments during the renewal term shall be subject to mutual agreement of American Outdoor and City.

No advertising is allowed on any portion of the sign that is not directly located within the 14’ x 48’ face, including any structural element.

**2.2 Condition Precedent.** American Outdoor may not install the signs unless and until (a) City receives a Relinquishment Agreement pursuant to the Marketplace Implementation Agreement (c2004-86) with Miravista/Vestar TM-LANDCO, L.L.C., a Delaware limited liability company (“Vestar”), from Vestar in which Vestar agrees to permanently remove or deactivate three of the four existing third faces on certain artistic display panels erected pursuant to the Marketplace Implementation Agreement, in substantially the form attached hereto as Exhibit 2.2, and (b) City receives confirmation that the three aforementioned third sides being exchanged have been removed or deactivated. It is further conditioned that within thirty (30) days of the approval and adoption of this Development Agreement, that American Outdoor will permanently remove the 400 square foot ‘Monti’s’ billboard located at 100 S. Mill. Developer represents and warrants that it owns the entitlements and rights to the Monti’s billboard, and upon request of City shall provide such evidence of ownership as City may reasonably request.

**2.3 Design Approvals.** The sign shall be consistent from a design standpoint with City standards, and the final location and design shall be reviewed and approved in writing

by the City Architect prior to its construction and installation. The City Architect shall not unreasonably withhold such review and/or approval.

**2.4 Public Safety Access.** American Outdoor shall make the sign available to the City and its various departments for use during emergency situations, the exact parameters of which shall include: (a) messaging that overrides advertising copy for one (1) hour and repeats for at least 8 seconds every minute until City notifies American Outdoor that the emergency has passed; (b) the sign shall not change messaging more frequently than every 8 seconds, shall be enabled only with static messages and shall not include flashing, blinking or moving lights; (c) the sign shall change copy instantaneously with no sense of movement during the transition from one ad to the next; (d) the sign shall include a dimmer that will operate to reduce the Nit level to 300 Nits every evening from sunset to 11:00 p.m.

**2.5 Duration of Sign.** The sign may remain on the Property for a period of 10 years from the date it is installed, but not later than December 31, 2020 (the "Term"). If American Outdoor is not then in default hereunder and has performed its other obligations under this Agreement to City's reasonable satisfaction, American Outdoor shall have an option to extend the duration of the sign for an additional term of five (5) years, exercisable by giving City written notice not less than 180 days prior to the expiration date of the then current term.

**2.6 Compliance with Laws; Standards.** American Outdoor shall comply with all laws, rules and regulations applicable to the sign. The sign may only be used for graphic display of information or products that are consistent with the community and moral standards of the City.

**2.7 General Cooperation.** City and American Outdoor acknowledge and agree that they shall cooperate in good faith with each other and use their respective good-faith and commercially reasonable efforts to perform their respective obligations under this Agreement.

**2.8 Audit.** American Outdoor shall submit to City such affidavits and other documents as City may reasonably request. Each payment under Section 2.1.4 shall be accompanied by a statement, certified as being true and correct on behalf of American Outdoor by its Chief Financial Officer, showing the amount of rent payable for the property during such year, and City and American Outdoor shall promptly reconcile any payments of the amounts due under Section 2.1.4. American Outdoor shall keep at its headquarters sufficient books of account, vouchers and other records showing its calculations of the amounts due under Section 2.1.4, and American Outdoor shall permit City and its agents at all reasonable times and upon reasonable advance notice, to examine the same for the purpose of verification of the statements hereinabove provided for.

**3. Indemnification of City.** American Outdoor shall indemnify, protect, defend and hold harmless the City, its council members, officers, employees and agents, from any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and clean-up actions of any kind, all costs and expenses incurred in connection therewith, including, without

limitation, reasonable attorneys' fees and costs of defense, arising directly or indirectly, in whole or in part, out of the performance of this Agreement by American Outdoor or City.

#### **4. Default; Remedies; Termination.**

**4.1 Default.** It shall be a default hereunder if either party fails to perform any of its obligations hereunder and such failure continues for a period of thirty (30) days after written notice from the non-defaulting party specifying in reasonable detail the nature of the failure; provided that if the nature of the default is such that it cannot reasonably be cured within the thirty-day period, no default shall be deemed to exist if the defaulting party commences a cure within that thirty-day period and diligently and expeditiously pursues such cure to completion within ninety (90) days.

**4.1.1 Additional Defaults.** In addition to the foregoing, it shall be a default hereunder if: (a) any petition or application for a custodian, as defined by Title 11, United States Code, as amended from time to time (the "Bankruptcy Code") or for any form of relief under any provision of the Bankruptcy Code or any other law pertaining to reorganization, insolvency or readjustment of debts is filed by or against American Outdoor or any partnership of which it is a partner, their respective assets or affairs, and such petition or application is not dismissed within ninety (90) days of such filing; (b) American Outdoor makes an assignment for the benefit of creditors, is not paying material debts as they become due, or is granted an order for relief under any chapter of the Bankruptcy Code; (c) a custodian, as defined by the Bankruptcy Code, takes charge of any property of American Outdoor or any property of any partnership of which it is a partner; (d) the dissolution or termination of existence of American Outdoor or the sale of all or substantially all of the assets, equity or member interests, or stock of American Outdoor, unless its obligations hereunder have been assumed by an entity whose financial capacity has been approved in advance by City (such approval not to be unreasonably withheld or delayed); or (e) the third sides or the Monti's billboard are reactivated or reconstructed while this Agreement is in effect.

**4.2 City's Remedies; Right to Terminate Agreement.** If, after the passage of any applicable cure period, American Outdoor remains in default under this Agreement, then the City shall have the right and option, without obligation, to (a) terminate this Agreement immediately upon written notice to the American Outdoor, in which event American Outdoor shall remove the sign within 60 days after termination, and (b) exercise such other remedies as are available at law or in equity for breach of contract. On any such termination, this Agreement shall be of no further force or effect other than the indemnification provisions which shall survive the expiration or termination of this Agreement.

**4.3 Developer's Remedies.** If the City is in default under this Agreement and the parties do not resolve the City's default pursuant to the nonbinding mediation described in this Agreement, American Outdoor shall have the right to terminate this Agreement upon written notice to the City. Within 60 days after any such termination, American Outdoor shall remove the sign.

**4.4 Duration of Development Agreement.** The term of this Agreement shall commence on the date it is executed by all of the Parties and continue for a period of ten (10) years, unless sooner terminated as provided herein. If the term of the sign is extended as permitted under Section 2.5, then the term of this Agreement shall be extended for a like period.

**5. General Provisions.**

**5.1 Notices.** All Notices which shall or may be given pursuant to this Agreement shall be in writing and may be given in person or transmitted by registered or certified mail, return receipt requested, addressed as follows:

***TO American Outdoor:***

***With a copy to:***

***TO THE CITY:***

City Manager  
City of Tempe  
P. O. Box 5002  
31 East 5<sup>th</sup> Street  
Tempe, Arizona 85281

***With a copy to:***

***City Attorney***  
Tempe City Attorney's Office  
P. O. Box 5002  
21 E. Sixth Street, Suite 201  
Tempe, Arizona 85281

Any Party hereto shall have the right to change its designated notice address by providing to the other Parties written notice of such change in the manner described above.

**5.2 Dispute Resolution.** In the event that there is a dispute hereunder which the parties cannot resolve between themselves, the parties agree that there shall be a forty-five (45) day moratorium on litigation during which time the parties agree to attempt to settle the dispute by nonbinding mediation before commencement of litigation. The mediation shall be held under the commercial mediation rules of the American Arbitration Association. The matter in dispute shall be submitted to a mediator mutually selected by American Outdoor and the City. In the event that the parties cannot agree upon the selection of a mediator within seven (7) days, then within three (3) days thereafter, the City and American Outdoor shall request the presiding judge of the Superior Court in and for the County of Maricopa, State of Arizona, to appoint an independent mediator. The mediator selected shall have at least five (5) years experience in mediating or arbitrating disputes relating to commercial property development. The cost of any such mediation shall be divided equally between the City and American Outdoor. The results of

the mediation shall be nonbinding on the parties, and any party shall be free to initiate litigation subsequent to the moratorium.

**5.3 Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona. This Agreement has been made and entered into in Maricopa County, Arizona.

**5.4 Successors and Assigns.** This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

**5.5 Waiver.** No waiver by either party of any breach of any of the terms, covenants or conditions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same for any other term, covenant or condition herein contained.

**5.6 Attorneys' Fees.** In the event of any litigation between the parties in connection with this Agreement, excluding the mediation process pursuant to Section 5.2, the party prevailing in such action shall be entitled to recover from the other party all of its costs, expenses and fees, including reasonable attorneys' fees, which shall be determined by the court and not by the jury.

**5.7 Severability; No Merger.** In the event that any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Agreement shall not be affected thereby and shall remain in full force and effect to the fullest extent permitted by law, to the extent the material provisions of this agreement are not vitiated.

**5.8 Schedules and Exhibits.** All schedules and exhibits attached hereto are incorporated herein by this reference as though fully set forth herein.

**5.9 Entire Agreement.** This Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties hereto, oral or written, are hereby superseded and merged herein.

**5.10 Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument.

**5.11 Recordation of Agreement.** This Agreement shall be recorded in the Official Records of Maricopa County, Arizona, within ten (10) days after its approval and execution by the City.

**5.12 No Partnership or Joint Venture.** Under no circumstances shall the parties hereto be considered partners or joint venturers.

**5.13 Conflict.** This Agreement is subject to cancellation per ARS 38-511.

IN WITNESS WHEREOF, the undersigned have caused this Development Agreement to be executed as of the day and year first above written.

**ATTEST:**

CITY OF TEMPE, an Arizona municipal corporation

\_\_\_\_\_  
City Clerk

By \_\_\_\_\_  
Hugh Hallman, Mayor

**APPROVED AS TO FORM:**

\_\_\_\_\_  
City Attorney

American Outdoor, a Nevada corporation

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

## Exhibit 2.2

[Vestar Letterhead]

City Manager  
City of Tempe  
P. O. Box 5002  
31 East 5<sup>th</sup> Street  
Tempe, Arizona 85281

Re: Relinquishment Agreement

Dear Mr. Meyer:

As you know, the City and Miravista/Vestar TM-Landco, L.L.C., a Delaware limited liability company ("Builder") are parties to the Marketplace Development Parcel Agreement Parcel No. 1, as amended by a Supplemental Development Parcel Agreement dated April 12, 2006, and by a further Supplement to City of Tempe Marketplace Implementation Agreement dated as of October \_\_\_\_, 2010 (the "Supplement"). (Capitalized terms used herein without definition have the meanings given such terms in the Supplement.)

Pursuant to Section 2 of the Supplement, Builder hereby agrees to permanently remove the Third Side of three of the four display panels and hereby permanently waives, surrenders and relinquishes any right to reinstall any such Third Side on the relinquished structures. The removed Third Sides constitute in the aggregate 960 square feet of display area.

We understand that upon receipt of this Relinquishment Agreement, and upon receipt of confirmation that the Third Sides have been removed or otherwise deactivated, City shall allow American Outdoor to use the square footage of the removed Third Sides for installation of a freeway sign in accordance with a development agreement to be entered into between City and American Outdoor.

Please feel free to contact the undersigned if we may provide any additional information or be of further assistance.

MIRAVISTA/VESTAR TM-LANDCO,  
L.L.C.

By: VESTAR TM-LANDCO, L.L.C.

Its: Managing Member

By: \_\_\_\_\_

Its: Manager



***Copies to:***

City Attorney  
Attn: Andrew B. Ching, Esq.  
Tempe City Attorney's Office  
P. O. Box 5002  
21 E. Sixth Street, Suite 201  
Tempe, Arizona 85281